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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 494

JACOB SCHOEPS,

Petitioner,

vs.

WILLIAM A. CARMICHAEL, District Director, Immigration and Naturalization Service, Department of Justice, Los Angeles, California, District No. 16

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 23, 1949 (R. 83)[1] affirming a judgment of the United States District Court for the Southern District of California.

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[1] References to the printed record will be thus: (R. 2). The original record of the deportation hearing and the order of the Chairman of the Board of Immigration Appeals, Department of Justice was attached as Exhibit B to respondent's return in the trial court (R. 21) and introduced as a joint exhibit A (R. 24). It was considered as an exhibit by the courts below and will be referred to herein thus: R. I.) Designation of the specific documents in R. I. will be made explicit.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was entered September 23, 1949 (R. 82). The issues as to which petitioner seeks this Court's review involve construction of Section 19(a) of the Immigration Act of February 5, 1917, 39 Stat. 889 (United States Code, Title 8, Sec. 155(a); the entire lack of any substantial evidence in the record upon which to predicate an order of deportation; and the denial of Petitioner's constitutional rights to due process under the Vth Amendment to the United States Constitution. These issues were decided adversely to the petitioner in both the trial (R. 44, 45) and lower (R. 68 *et seq.*) courts.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and 2101 (c).

Statute Involved

The relevant provision of Section 19(a) of the Immigration Act of February 5, 1917, 39 Stat. 889, 8 U. S. C. 155 (a) is as follows:

> "* * * except as hereinafter provided, any alien who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this Country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * any alien who was convicted or who admits the commission prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; * * * shall upon the warrant of the Attorney General be taken into custody and deported. * * *

"The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this subchapter; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment. The provisions of this section with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States. • • •"

Question Presented

Whether Petitioner, a legal and permanent resident of this country since 1911, is deportable under Section 19(a) of the Immigration Act of 1917, as amended, on his uncorroborated, preliminary immigration, investigative statement made before warrant of arrest, without benefit of counsel, later repudiated, that he admitted the commission of a crime involving moral turpitude in New York in 1923, prior to his having lunched in Tijuana, Mexico in 1939, legally returning to the United States the same day, which going out and coming in was also denied by him on formal deportation hearing.

Statement of the Case

The Petitioner herein filed a petition for a Writ of Habeas Corpus in the District Court, praying therein for his release from the custody of the Immigration Authori-

ties by whom he was held under a warrant of deportation purportedly issued under section 19(a). (R. 2).

FACTS—Petitioner was born in Germany on November 27, 1893 (R. I. 3) and was legally admitted to this Country as a permanent resident.

There is conflict on the question of whether he ever left the United States since that time. At the formal hearing, petitioner stated that he had not (R. I. 5). The hearing officer introduced a statement purportedly made by him while in jail to an inspector of the Immigration Service to the effect that he had gone to Tijuana, Mexico on Thanksgiving Day in 1939, stayed 4 hours and returned to San Diego the same day (Exh. 2, Pg. 4).[2]

Subsequently thereto, in March 1943, Petitioner was arrested on a child charge (R. I. 5). He was released from that charge and no proceedings concerning it were ever instituted (R. I. 17).

While in jail and while unrepresented by counsel, he was interrogated by an Inspector for the Immigration Service (R. I. 8). He was also interrogated by the Police Psychiatrist of the City of Los Angeles (R. I. 18). The statements assertedly made by petitioner to those two persons at those times were admitted into evidence and appear as Exhibits 2, 3, 4 and 6 of the Deportation Record, R. I. Those statements are to the effect that in about 1923 he had "played" with a 7 year old girl in New York (Exh. 2, pg. 6; Exh. 3, pg. 4; Exh. 4, pg. 3; Exh. 6, pg. 8—all to R. I.).

It is on the basis of the admission of this affair in New York in 1923 that the warrant of deportation was issued—i.e., that petitioner admitted the commission of a crime involving moral turpitude prior to his "entry" into the

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[2] Reference to the Exhibits are the Exhibits attached to the Deportation Record (R. I.).

United States in 1939 after visiting Tijuana, Lower California, Mexico for four hours.

There was no independent proof, evidence, suggestion, or corroboration, neither of the 1923 New York incident, nor of the 1939 "entry."

The Government's entire case rests upon this statement attributed to petitioner, introduced as Exhibits at the hearing. *The truth of the statements has never been established.*

Rulings by the Immigration Authorities—On this state of facts the immigration authorities found that petitioner had made an "entry" into the United States within the meaning of Section 19(a) (R. I. 8/17/43, pg. 2) and that he had admitted the commission of an offense involving moral turpitude in 1923 in New York, contrary to Section 483-a of the New York Penal Code. (R. I. pg. 2, 8/17/43). Therefore, the authorities concluded, he is deportable to Germany under Section 19(a).

Decisions Below—The trial Court ruled, without opinion, that the Writ of Habeas Corpus previously issued be discharged and dismissed and the petitioner be remanded to the Immigration and Naturalization Authorities (R. 47).

The Court of Appeals affirmed (R. 83), holding (R. 62 *et seq*): (1) That the evidence was substantial and reliable (R. 68); (2) though characterizing petitioner's afternoon in Tijuana and return as a "*re*-entry," that it nevertheless constituted an "entry" within section 19(a). (The statute says "entry," not "re-entry"); (3) as to the alleged prior crime, the fact that it was admitted to have been committed in the United States was of no consequence so long as it was "prior to entry," (R. 69); (4) that on the ground they constituted admissions, the prior statements, on which the Government's entire case must hinge, made while in jail and without benefit of counsel, were admissible (R. 76), (5) including the hearsay report of the city psychiatrist

(R. 78); and (6) that no privilege against self-incrimination was infringed (R. 79).

While not in words the opinion of the Court, the concurring opinion (R. 80) shines a beacon on the Court's thinking.

After pointing out that, in his opinion, Section 19(a) makes an untenable distinction between an alien who commits a crime of enormity and one who makes an entry after committing such a crime (R. 81) and how *U. S. ex rel Volpe* v. *Smith*, 289 U. S. 422 represents a rule of law not based on logic because, "No obvious answer occurs to the query of how a man can make a re-entry as an alien from a foreign country on which he has casually set foot into a country in which he has already been permanently domiciled for more than twenty years." Yet, nevertheless, petitioner is deportable because: "We believe, as a policy, this alien and all others who have committed such crimes should be deported whether they have re-entered or not, * * *"

This, irrespective of fundamental logic, fairness or justice and in the face of the fact that the Statute says "entry" not "re-entry."

Reasons for Granting the Writ

1. The act attributed to petitioner constituted no crime at all, neither misdemeanor, felony, or moral turpitude or otherwise, in New York in 1921, or 1923,[3] when it was supposed to have been committed. The holding of the court below (R. 67, 69) that the evidence was substantial and reliable and that the act constituted a felony in New York in 1923 and the trial Court's findings of fact (R. 43-44) that petitioner's admission of the commission of an act in

[3] There is some confusion in the record as to whether the incident occurred in 1921 or 1923. In Exh. 2, Pg. 6, Exh. 4, Pg. 3 and Exh. 6, Pg. 9 the time is put in 1923; While in Exh. 3, Pg. 3, it was said to be in 1921. However, the discrepancy is immaterial because the act charged to petitioner was no crime in New York, either in 1921 or 1923.

New York in 1923 was in violation of Section 483a of the New York Penal Code and that said act constituted a felony or other crime or misdemeanor involving moral turpitude are absolutely erroneous and based on no facts or law whatsoever.

There was *no* Section 483a of the New York Penal Code in either 1921 or 1923, nor was the crime denounced by the later enacted section 483a a crime in New York at that time. See Article 44, New York Penal Code, § 480 through 494, containing the provisions as to crimes concerning children. The same numbering system was in effect in 1921, 1923 and now. Section 483a of the New York Penal Code and the acts prohibited by it were first enacted in Chapter 383 of the Laws of 1927 and later amended to its present form in Chapter 424, Laws of 1933.

The act supposed to have been admitted and committed by petitioner not having been a crime of any kind in New York at the time of its alleged commission, petitioner cannot be deported under Section 19(a) for the admission of the commission of a crime which did not exist. This alone if there be no other reason, is ample ground for this Court's granting the Writ. The error is palpable on its face.

2. The decision by the court below establishes a proposition shocking to contemplate. It is elementary law that there can be no conviction for a crime without at least a minimum establishment that *a* crime was committed. That is, without there being a corpus delecti. See *Isaacs* v. *U. S.*, 159 U. S. 487, 490. This Court has often pointed out that deportation may and often is of far more serious consequence than conviction for crime, and that even in deportation proceedings, civil in nature, at least the minimum guarantees of due process must be observed (*Bridges* v. *Wixon*, 326 U. S. 135, 154). Yet here we have a case of absolute banishment and exile on the uncorroborated,

garbled statement of the petitioner that in 1923 he played with a child in New York; all this, without arrest, trial, hearing, conviction, or proof of the truth of the charge. There is no independent proof or even a suggestion that the crime was actually committed. It would seem manifest that at least the basic safeguard of that minimal proof would be required. This Court's review is necessary to prevent so harsh a rule being engrained in a law which is already notorious for its harshness.

3. The decision of the lower court is in irreconcilable conflict with at least two of its own previous decisions, *Wong Yee* v. *Weedin*, 33 Fed. (2d) 377, and *Shubata* v. *Carr*, 35 Fed. (2d) 636, neither of which the lower court cited nor considered and which cases exhaustively discuss the question, urged by petitioner, but not passed by the lower court, that no deportation can be predicated upon the admission of a crime committed in the United States.

The decision of the court below is also, in principle, in conflict with decisions of the 2nd and 3rd Circuits which hold that the pardon and recommendation clauses of Section 19(a) apply only to crimes committed in this country and not elsewhere. See *U. S. ex rel. Palermo* vs. *Smith*, 17 Fed. (2d) 534 (C. C. A. 2 1927), *Rasmussen* v. *Robinson*, 163 F. (2d) 732 (C. C. A. 3 1947), and *United States* v. *Hughes*, 116 F. (2d) 613 (C. C. A. 3 1940).

Again, the decision below is, in principle, in conflict with another decision of the 9th Circuit which also holds that the pardon provision of Section 19(a) applies only to a crime committed in the United States and not elsewhere. (*Weedin* v. *Hempel*, 28 Fed. (2d) 603 (C. C. A. 9 1928).

Because of this great confusion and conflict, a decision by this Court is necessary to eliminate it. As will be pointed out below, *U. S. ex rel. Volpe* v. *Smith*, 289 U. S. 422, relied upon by the lower court, did not dispel the confusion and did not pass upon the question here involved.

No adjudicated decision, other than the instant case, has been found in the history of the United States authorizing the deportation of a person based upon mere admission of a purported crime committed in this country. The point has never been passed upon by this Court and review is necessary in order that a definitive decision may be had on so vital a question.

4. The correct construction of the word "entry" in Section 19(a) is of great importance in the proper administration of the Immigration Act. In particular, the question of establishing the materiality of an alien's intention to return when he stays across the border for a few hours is of vital concern to the more than three million aliens in this Country. Bluntly, it is time for this Court to consider whether the word "entry" in Section 19(a) means what it says or whether it means, as the lower court found, "*re*-entry."

The lower court's ruling is erroneous and should not be allowed to stand. Until *Delgadillo* vs. *Carmichael*, 332 U. S. 388 the concept that "entry" meant "re-entry" gave rise to such amazing decisions as *Ward* v. *De Barros*, 75 Fed. (2d) 34 (C. C. A. 1 1935), a "sleeping car" case. It is embarrasing to contemplate how many aliens have been deported on so harsh a rule prior to the *Delgadillo* decision.

The lower court's decision is unreasonable in that it makes the fundamental right of residence in the country depend upon whim, fortuity and caprice. It is no answer to say that when petitioner stepped over the border, fully intending to return within a few hours and did indeed so return, petitioner knew he was leaving the country and therefore should suffer banishment.

This case squarely gives this Court the opportunity to decide whether it is within the dignity of this nation to exercise the horrible punishment of exile on such flimsy grounds. The concurring Judge below recognized the

tenuousness of the lower court's reasoning but contented himself with saying that it was alright because we ought to get rid of such persons anyway. The lower court's logic was the same in the *Delgadillo* case and this Court properly pointed out its fallacy. This Court should give heed to such expressions by Judges faced with the problem as,

> "Ever since it was first held that a departure, however brief and temporary, and without regard to intention to relinquish domicile, makes subsequent return a new entry, courts in border districts have found it difficult to remain silent when the result in human misery of a literal reading of the act has been realized." (*Jackson* vs. *Zurbrich*, 59 Fed. (2d) 937, 938), and

> "It is the opinion of this Court that the harshness, severity and injustice of several provisions of the immigration laws should be corrected by the higher courts or by Congress. This Court has no power except to respectfully make the suggestion. Trial courts come in direct contact with many of these problems. (*Ex Parte Delaney*, 72 Supp. 312, 321 (D. C. S. D. Calif. 1947).)

Compare also this language from the 9th Circuit Court of Appeals in *Carmichael* v. *Delaney*, 170 Fed. (2d) 239, 242:

> "It is true that until very recently, except for an enlightened decision by the Second Circuit, the federal courts had fallen into the habit of treating every arrival from a foreign port or place of entry, no matter what the circumstances or however harsh and unanticipated might be the consequences to the individual. The Supreme Court itself, as it has recognized, was not without responsibility for the propagation of this extreme view. But in *Delgadillo* v. *Carmichael, supra*, the Court brought a needed measure of restraint into the interpretation of the law on the subject."

In the light of the facts in the case at bar and of the decision of this Court in *Delgadillo*, the sweep of the doctrine of *U. S. ex rel. Volpe* v. *Smith*, 289 U. S. 422, on which the lower court relied, should be re-examined.

Argument

I

THE ACT PURPORTEDLY ADMITTED BY PETITIONER, NOT BEING A CRIME OF ANY KIND AT THE TIME OF COMMISSION, HE CANNOT BE DEPORTED FOR "ADMITTING" A NON-EXISTENT CRIME.

It is elementary, of course, that if the act admitted by an alien under section 19(a) is not "a felony or other crime or misdemeanor," he cannot be deported merely because he admits some act involving moral turpitude. The grounds for deportation enumerated in the section are exclusive (*Ex Parte Guest*, 287 Fed. 884, 892 (D. C. R. I. 1923, cf. *Gegiow* v. *U. S.*, 239 U. S. 3, 9). And just as one cannot be deported for the commission of a crime not involving moral turpitude (*U. S. ex rel. Guarino* v. *Uhl*, 107 Fed. (2d) 399 (C. C. A. 2 1939), so to the same effect, may one not be deported for the admission of an act which, though involving moral turpitude, is not a crime. Neither the Immigration authorities nor the Courts may consider the particular conduct attributed to the alien (*Ibid.*). Section 19(a) speaks of felonies, crimes or other misdemeanors; it does not speak of acts which are not one of those three.

Similarly is it elementary that there can be no crime unless it is set down in the Penal Laws. And where, as here, the crime alleged to have been admitted and committed is one against the laws of a State, here New York, it is to the laws of that State that we must turn to ascertain whether the acts admitted constituted a crime in that State at the time it is supposed to have been committed. See *U. S.*

ex rel. Zaffarano v. *Corsi*, 63 Fed. (2d) 757 (C. C. A. 2 1933), *U. S. ex rel Freislenger* v. *Smith*, 41 Fed. (2d) 707 (C. C. A. 7 1930), *U. S. ex rel. Mongiovi* v. *Karnuth*, 30 Fed. (2d) 825 (D. C. N. Y. 1929).

In the case at bar the task is simple because a particular code section is pointed to and relied on by the Government and the lower court (R. 63). But neither the Code section nor a predecessor to it existed at the time involved.

In 1923, as today, Article 44 of the New York Penal Code contained the criminal provisions regarding children. See Gilbert's Annotated Criminal Code and Penal Law, 1923 (Mathew, Bender & Co., Inc.). The sections in that article numbered from 480 through 494 inclusive. There was no 483a nor were the acts now denounced by 483a prohibited anywhere in the article.

The Section appeared for the first time in 1927. Chapter 383 of the New York Laws of 1927 was enacted on March 27, 1927 and read as follows:

> "Section 1. The Penal law is hereby amended by *inserting* therein *a new section,* (italics added) to follow Section four hundred and eighty-three, to be Section four hundred and eighty-three-a, to read as follows:
>
> "§ 483a. *Carnal abuse of a female child.* Any male person of the age of eighteen years or over who carnally abuses the body or indulges in any indecent or immoral practices with the sexual parts or organs of a female child of the age of ten years or under, shall be guilty of a felony, punishable on conviction thereof, by imprisonment for not more than ten years.
>
> "§ 2. This act shall take effect September first, nineteen hundred and twenty-seven."

The section was amended to its present form on April 24, 1933 by Chapter 424, New York Laws of 1933 as follows:

"Section 1. Section four hundred and eighty-three-a of the penal law, is hereby amended to read as follows:

"§ 483-a. *Carnal abuse of a child.* Any person of the age of eighteen years or over who carnally abuses the body or indulges in any indecent or immoral practices with the sexual parts or organs of a child of the age of ten years or under, shall be guilty of a felony, punishable, on conviction thereof, by imprisonment for not more than ten years.

"§ 2. This Act shall take effect September first, nineteen hundred and thirty-three."

Accordingly, the act "admitted" by petitioner not having been a crime at the time performed, he cannot be deported under Section 19(a) for having admitted it. It could not be contended that the enactment of New York Penal Code Section 483a in 1927 would make an alien deportable for what was done in 1923 when the law did not denounce it or exist.

Such an *ex post facto* construction should most certainly not be permitted. It would be as bad as convicting one for commission of an offense which was not charged. (*Cole* v. *Arkansas*, 333 U. S. 196.)

Under section 19(a) the necessity of there being a crime is jurisdictional to a valid order of deportation.

II

IT IS CONTRARY TO ALL PRINCIPLES OF FAIRNESS AND DUE PROCESS TO PERMIT DEPORTATION ON THE MERE ADMISSION ONLY OF A CRIME WITHOUT THERE BEING ANY INDEPENDENT PROOF OF ITS COMMISSION OR TRUTH OF THE FACTS ADMITTED.

The decision of the court below permitting deportation on the chance "admission" by an alien of a crime committed 20 years previous without there being even a scintilla of evidence that *a* crime was committed, is shocking to the senses, to concepts of fair play and to principles of Anglo-

Saxon jurisprudence. Such a rule cannot be justified legally; it can only be justified emotionally as did the concurring judge below (R. 82): "we believe, as a policy, (that) this alien and all others who have committed such crimes should be deported. * * *"

This Court has often pointed out the drasticness of deportation. It has been characterized as, at times, worse than criminal punishment itself. (*Delgadillo* v. *Carmichael,* 332 U. S. 388, 391, *Bridges* v. *Wixon,* 326 U. S. 135, 147, *Ng Fung Ho* v. *White,* 259 U. S. 276, 284 (it may result in the loss "of all that makes life worth living"). Certainly for so drastic a punishment, minimum consideration of fairness should be applied.

It is elementary law that without the establishment of the crime itself, the *corpus delecti,* no confession or admission can result in conviction. That is the rule in this Court (*Isaacs* v. *United States,* 159 U. S. 487, 490) and it is the rule in the other Federal Courts, including the 9th Circuit (*Pon Wing Quong* v. *United States,* 160 Fed. (2d) 650, 651 (CCA 5 1947), *Tabor* v. *United States,* 152 Fed. (2d) 254, 257 (CCA 4 1945), *Gulotta* v. *United States,* 113 Fed. (2d) 683, 685 (CCA 8 1940), *Noftzger* v. *United States,* 200 Fed. 494, 498 (CCA 8 1912), *Martin* v. *United States,* 264 Fed. 950, 951 (CCA 8 1920), *Goff* v. *United States,* 257 Fed. 294, 296 (CCA 8 1919), *United States* v. *Mayfield,* 59 Fed. 118 (CCA Ed. La. 1893).

This is also the rule in New York today where the crime is alleged to have been committed (N. Y. Code Criminal Procedure § 395), and it was the rule then in 1923 at the time it is supposed to have been committed (*People* v. *Krauss,* 192 App. Div. 403 (1920); *People* v. *Roach,* 215 N. Y. 592, 600 (1915).

Having the above rule of minimum safeguard in mind, the proposition contended for by the Government and concurred in by the lower court is monstrous and degrading.

We have a picture wherein the fateful consequence of deportation is sought to be visited on petitioner in a situation where there is no proof, nor even a suggestion, that *any crime at all* was committed.

Petitioner does not suggest that the strict rules of criminal evidence are absolutely applicable here and that in a proper case the statements of petitioner might not have been considered. He does urge most vigorously, however, that without proof that *a* crime was committed, his extra judicial admission of one, uncorroborated, cannot sanction deportation. As this Court said in *Bridges* v. *Wixon*, 326 U. S. 135, 154:

> "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

Even stronger is the language of the concurring justice in that case (Page 163 of 326 U. S.):

> "It is no answer that a deportation proceeding is technically non-criminal in nature and that a deportable alien is not adjudged guilty of a 'crime'. Those are over-subtle niceties that shed their significance when we are concerned with safeguarding the ideals of the Bill of Rights. The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his notive land may result in poverty, persecution, and even death. There is no justifiable reason for discarding the democratic and humane tenets of our legal system and descending to the practices of despotism in dealing with deportation."

This Court can do no less in this case.

Petitioner was never arrested, tried or convicted of the crime upon which the order of deportation is based, nor has he ever been convicted of any crime anywhere (R. I. 17).

III

THE ADMISSION CLAUSE OF SECTION 19 (A) DOES NOT APPLY UNLESS THE CRIME IS COMMITTED OUTSIDE THE UNITED STATES.

The lower court did not discuss the point raised by petitioner below that there is a difference between the admission clause and the conviction clause of section 19(a). Instead the lower court contented itself with citing *U. S. ex rel. Volpe* v. *Smith,* 289 U. S. 422) and did not consider its own previous decisions in *Wong Yow* v. *Weedin,* 33 Fed. (2d) 377 and *Shubata* v. *Carr,* 35 Fed. (2d) 636 nor the rationale of those decisions.

It is submitted that the lower court's reliance on the *Smith* case is misplaced. That case was not concerned with an admission situation. It was a case of conviction in a court of law in the United States. It cannot, therefore, be contended that the *Smith* case modified or limited the lower court's decisions in the *Wong Yee* and *Shubata* cases, which held squarely that in an admission situation, an alien is not deportable where the crime which he admitted having committed took place in the United States.

No decision has been found in the United States in any Circuit, other than the Ninth, where the court was confronted with an admission situation. Therefore, the rationale of the Ninth Circuit cases is applicable, particularly where the lower court did not discuss them and did not attempt to refute their logic.

The correct construction of the clause and the basis for it is thus set forth in *Wong Yow* v. *Weedin,* 33 Fed. (2d) 377,

"• • • Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion. *Lau Ow Bew* v. *United States,* 144 U. S. 47, 59, 12 S. Ct. 517, 520 (36 L. Ed. 340.) Plainly, by the section under consideration, Congress intended to group all aliens deportable for the commission of a crime, into two classes, and the more reasonable view is that the classification was made with reference to the place where the crime was committed, whether in or out of this country. Such in plain language is the statutory characterization of the first class; the phrase being, 'conviction in this country of a crime.' True, when it comes to the second class, the phrase used is 'prior to entry,' but we are inclined to think that Congress, probably having in mind only a single entry used the phrase as synonymous with 'out of this country.' Unless that view be taken, the language leads to confusion. For example, under the government's construction, appellant's case falls within both classes. The offense with which he is charged was committed 'in this country,' and it was also committed 'prior to entry,' if for the purpose of the provision his last return be deemed an 'entry.' *The commission of an offense entails radically different consequences, depending on where it was committed. In case it was committed in this country, deportation is subject to statute of limitations, is conditioned upon 'conviction,' and may be defeated by either judicial recommendation or executive clemency, whereas, if committed out of this country, 'conviction' is not requisite nor can resort be had to judicial recommendation or pardon.*" (Italics added.)

This case was followed by *Shubata* v. *Carr,* 35 F. 2nd, 636, 638:

"But however that may be, if there was perjury at all, the offense was committed in Seattle and hence within the territory of the United States and that the

> appellant could have been criminally prosecuted in the Courts of the United States for the offense there can be no doubt. That being true, under the Immigration Act as we have construed it in *Wong Yow* v. *Weedin* (C.C.A.) 33 F. (2d) 377, *appellant is subject to deportation for the offense, not in case of admission, but only in case of a conviction.* It is therefore thought that the deportation warrant is void." (Italics added.)

Again, in *Ono* v. *Carr,* 56 F. (2d) 772, 773, the Court observed:

> "It is held in those cases that an admission of the commission of a felony in order to constitute a ground of deportation, must be an admission of the commission of a felony 'prior to entry'; that *if the felony was committed in the United States the deportation must be based upon a conviction* of a felony, whereas no such distinction is made in the provision of the Immigration Laws dealing with the entry of aliens which reads as follows:
>
> '. . . Persons who have been convicted of or who admit having committed a felony or other crime or misdemeanor, involving moral turpitude. . . .' "

Reading the applicable provisions of Section 19a together to give rational, logical, sensible and statutory sequence and interpretation to its meaning, it must be held that a bare admission means nothing unless of a crime committed outside the country. Even upon conviction and sentence, if in this country, the alien may secure relief from deportation by pardon, executive clemency, judicial recommendation, etc. If the admission clause is not confined to foreign crimes, we have the absurd situation where these safeguards and possibilities are not permitted. So capricious an intent should not be attributed to Congress.

The concept that different consequences ensue depending upon whether a crime was committed within or without

this country is not confined to the admission or conviction clause of Section 19(a). Thus it is held with reference to the pardon and recommendation clauses of the Section, that they apply only if the conviction and pardon or recommendation were in this country and not elsewhere. See *U. S. ex rel. Palermo* v. *Smith,* 17 Fed. (2d) 534 (CCCA 2 1927), *Weedin* v. *Hempel,* 28 Fed. (2d) 603 (CCA 9 1928), *Rasmussen* v. *Robinson,* 163 Fed. (2d) 732 (CCA 3 1947), *United States* v. *Hughes,* 116 Fed. (2d) 613 (CCA 3 1940).

Taking those latter cases into consideration with the position of the Government's in the instant case, the situation is one where the alien is sought to be held both "coming and going." Thus if he were convicted in another country and pardoned there, he is nevertheless deportable; not so if this occurred in this country. This is the doctrine, established, of course, over the Immigration Authorities' objection, of the cases just cited. However, now say these same authorities, if he merely admits the commission of a crime before entry, he is deportable regardless of the place the crime was committed. Thus, the same alien, if convicted in this country, may not be deportable, but if he admits the crime in this country, he is. It would seem that so arbitrary a rule does not comport with the principle that statutes must be given a reasonable construction, nor with the rule that all parts of the statute must be given effect.

And finally, the construction urged by petitioner dovetails in and gives a reasonable construction to the word "entry" discussed under Point IV, *infra.* It means that in Section 19(a) the intent of Congress is to permit deportation within five years after a conviction in this country and not at all if there is only an admission; while as to a crime committed elsewhere before entry, whether ascer-

tained by admission or conviction, there is no status of limitations. Thus construed, the statute makes sense, effect is given to all parts of it and deportation does not depend upon the caprice or fortuity of having lunch in a restaurant across the street.

IV

THE TERM "ENTRY" IN SECTION 19(A) DOES NOT MEAN A "*RE*-ENTRY" OF AN ALIEN LAWFULLY ADMITTED TO THIS COUNTRY FOR PERMANENT RESIDENCE WHO HAS MOMENTARILY STEPPED ACROSS OUR BORDERS ALWAYS INTENDING TO RETURN AND ACTUALLY RETURNING WITHOUT GIVING UP HIS RESIDENCY OR THE PERMANENCY THEREOF.

Perhaps some theoretical or legalistic basis could be suggested here to distinguish this case from *United States ex rel. Volpe* v. *Smith,* 289 U. S. 422, on this entry point on which the lower court relied, and from *Lapina* v. *Williams,* 232 U. S. 78, *Lewis* v. *Frick,* 233 U. S. 291 and *United States ex rel. Clausen* v. *Day,* 279 U. S. 398 on which the *Smith* case is based. This was the approach adopted successfully in the Petition in *Delgadillo* v. *Carmichael,* 332 U. S. 388. See Page 8 *et seq.*, Petition for Writ of Certiorari in the latter case, No. 63, October term, 1947.

Thus it could be suggested that an alien permanently and lawfully residing in this country for some 28 years who lives in California and simply steps a few hundred yards across the border of the contiguous State of Mexico for a few hours to have lunch or to shop or to view the races is in an entirely different category from one who boards a ship or airplane, goes to Cuba, stays for a visit and then returns in an airplane. (*Smith* case) or from one who knowingly sails out on ships destined for distant foreign shores and then returns (*Day* case) or from one who designedly went across to Canada for the purpose of bringing back a woman for immoral purposes (*Lewis* v. *Frick*) or from one who boards a ship destined for Russia and stays

there for a visit before returning to this country (*Lapina* v. *Williams*). In other words it may be suggested that in petitioner's case there was really no break in continuity of *permanent residence* and that the above mentioned cases do not apply and that the principle of *Delgadillo* does.

However, any such attempt at distinction would concededly be leaning on a slim reed. The truth of the matter is that the rule that "entry" in Section 19(a) means "re-entry" of an alien who is lawfully here for permanent residence and who never relinquished that residence is an unreasonable and unwarranted construction of that section and not required nor sanctioned by it. Courts which have been faced with the rule have recognized its harshness; even both opinions in the lower court in the case at bar recognized its lack of logic (R. 69, 81). Indeed the concurring opinion recognized the "highly fortuitous incidence of such" an entry (R. 82) and pointedly said:

> "No obvious answer occurs to the query of how a man can make a re-entry as an alien from a foreign country on which he has casually set foot into a country in which he has already been permanently domiciled for more than twenty years."

Nevertheless both opinions below rested on the theory that petitioner is a bad person (R. 69, 82) and should be deported in any event, irrespective of the logic or harshness of the rule. But, as has often been said, even bad persons have rights before the law in this country (*Andrews* v. *Chesapeake and Potomac Telephone Co.*, 83 Fed. Supp. 966, 968).

The spectacle of the Government of the United States lying in wait for an alien who was punished for his prior crime or who, because the laws of the State wherein the crime was supposed to have been committed say that he shall not be punished, unsuspectingly innocently and

momentarily barely sets foot across the border, and then pouncing on him, to inflict the horrible punishment of banishment and exile is one unfitting of this great Nation.

The "entry" rule now extant, limited only by the *Delgadillo* doctrine, is illogical, capricious and is not required by the statute. The language of this Court in *Delgadillo* is equally applicable here (332 U. S. 388, 391):

> "Respect for law does not thrive on captious interpretations.
>
> "Deportation can be the equivalent of banishment or exile. See Bridges *v.* Wixon, 326 U. S. 135, 147. The stakes are indeed high and momentous for the alien who has acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme."

Conclusion

The Petitioner's Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 494

JACOB SCHOEPS, PETITIONER

v.

WILLIAM A. CARMICHAEL, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, LOS ANGELES, CALIFORNIA, DISTRICT NO. 16

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion (R. 62-80) and concurring opinion (R. 80-82) in the Court of Appeals are reported at 177 F. 2d 391. The findings of fact and conclusions of law of the District Court (R. 39-45) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 23, 1949 (R. 82-83). The petition for a writ of certiorari was filed on December

22, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether, under Section 19(a) of the Immigration Act of February 5, 1917, petitioner, an alien who has resided in the United States since 1911, made an entry into the United States in 1939 when he returned after a voluntary absence of several hours in Mexico, and whether, under that section, he is deportable on the basis of his having thereafter admitted the commission in New York in 1921 or 1923 of a crime involving moral turpitude.

STATUTE INVOLVED

Section 19(a) of the Immigration Act of February 5, 1917, 39 Stat. 874, 889, as amended by Sec. 20 of the Act of June 28, 1940, 54 Stat. 671, and by Reorganization Plan No. V, 54 Stat. 1238 8 U.S.C. 155(a), provides in relevant part:

> * * * except as hereinafter provided, any alien who is hereafter [after May 1, 1917] sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misde-

meanor involving moral turpitude; * * * shall upon the warrant of the Attorney General, be taken into custody and deported. * * * the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this Act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment. * * * the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States: * * *.

STATEMENT

Petitioner, a native of Germany, arrived in the United States on February 17, 1911 (Ex. 5).[1] He never became a citizen of this country. In March 1943, he was arrested in Los Angeles, California, charged with committing a sex offense upon a three-year old girl (Ex. 2, p. 5). He was interrogated

[1] The exhibits referred to are contained in the original record of the deportation proceeding which was introduced and made part of the record in the District Court (R. 23-24, 48-50). This original record is not reproduced in the printed record but is on file with the Clerk of this Court.

under oath by an immigration inspector, James R. Busselle, on March 10 and March 12, 1943 (Exs. 2, 3). Petitioner told the inspector in detail what he had done to the child and, upon the latter's inquiry, stated that he had committed a similar offense in New York upon a seven-year old girl named Lena Stench (Ex. 2, pp. 5-6). The date of the latter offense was fixed at approximately the year 1921 (Ex. 3, p. 3). Petitioner also stated that on Thanksgiving Day, 1939, he went to Tiajuana, Mexico, to see the races and returned to the United States four hours later (Ex. 2, p. 4). These statements were reduced to writing and petitioner signed them (Exs. 2, 3).

Beginning on June 8, 1943, hearings were held before a presiding inspector of the Immigration and Naturalization Service pursuant to a warrant of arrest charging that petitioner had been found in the United States in violation of the immigration laws in that he admitted having committed a crime involving moral turpitude prior to his entry into the United States, "to wit, he being over the age of 18 years indulged in indecent and immoral practices with the sexual parts or organs of a child under the age of 10 years" (R. 3). Further hearings were held on June 12, July 17, and August 6, 1943, at which petitioner was represented by counsel (*ibid.*). In the course of these hearings, petitioner denied that he had entered the United States on Thanksgiving Day, 1939, but admitted that he had made the statements of March

10 and March 12, 1943, to inspector Busselle (R. 6). When confronted with his signed statements and asked whether he had made them, respondent remained mute upon advice of counsel (R. 13-15). He denied that he had ever been arrested in connection with his offense against Lena Stench, but failed to deny that he had committed the offense (R. 9-10).

On April 10, 1944, a warrant of deportation was issued directing petitioner's deportation to Germany (R. 22-23). On January 20, 1948, after a series of delays due in part to petitioner's disabilities resulting from an accident (see R. 17), he was taken into custody under this warrant (R. 21).

On the same date, petitioner filed a petition for a writ of habeas corpus in the District Court for the Southern District of California (R. 2-18). The writ issued (R. 19-20), respondent filed a return (R. 21-22), and, after hearings, the District Court made findings of fact, among others, that petitioner last entered the United States on or about Thanksgiving Day, 1939, after a temporary absence in Mexico, and that he had voluntarily admitted the commission of an offense involving moral turpitude in New York City in 1923,[2] in

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[2] The difference between this date and the 1921 date given by petitioner (*supra*, p. 4) has no significance. As we point out (*infra*, pp. 6-7), the act which he admitted was a crime under a New York law which was enacted over half a century ago and has been continuously since then and is still in effect.

violation of Section 483a of the New York Penal Code (R. 40). The court held, in its conclusions of law, that the issuance of the warrant of deportation was due and regular and not arbitrary or capricious, and that the decision to issue it was supported by substantial evidence (R. 44-45). Accordingly, the writ of habeas corpus was discharged and dismissed (R. 46-47), and the order was affirmed by the Court of Appeals for the Ninth Circuit (R. 83).

ARGUMENT

1. Petitioner's contention, made here for the first time (see Pet. 7), that the act of moral turpitude upon which his deportation was predicated was not a crime under New York law at the time of its commission and, consequently, could not be the basis of deportation (Pet. 11-13), involves a twofold error. He correctly states (Pet. 12) that Section 483a of the New York Penal Laws was not enacted until 1927. Consequently, the reference to it by the Immigration and Naturalization Service and the courts below as the section violated by petitioner's admitted offense was mistaken. But, on the other hand, petitioner is himself incorrect in assuming therefore that his act was not a crime under New York law.

Section 483 of the New York Penal Laws was enacted by the Laws of 1881, Chap. 676, Sec. 289, and amended by the Laws of 1888, Chap. 145, Sec. 5. Continuously in effect since then, it provides:

A person who:

1. Wilfully causes or permits the life or limb of any child actually or apparently under the age of sixteen years to be endangered, or its health to be injured, or its morals to become depraved; or

2. Wilfully causes or permits such child to be placed in such a situation or to engage in such an occupation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired,

Is guilty of a misdemeanor.

The courts of New York have repeatedly held that acts such as those committed by petitioner are violations of Section 483. *People* v. *Gibson*, 232 N.Y. 458, 462, 134 N.E. 531; *People* v. *Onody*, 296 N.Y. 305, 73 N.E. 2d 35; *People* v. *Trenkle*, 169 Misc. 687, 9 N.Y. Supp. 2d 661; *People* v. *Donohue*, 114 App. Div. 830, 100 N.Y. Supp. 202. Petitioner's offense, notwithstanding that it was erroneously termed a violation of Section 483a, was a crime under Section 483. And there can be no doubt, nor does petitioner deny, that it involved moral turpitude. *Ng Sui Wing* v. *United States*, 46 F. 2d 755 (C.A. 7).

2. As we understand his second contention (Pet. 13-16), petitioner would assimilate into a deportation proceeding based upon an admission of the commission of a crime prior to entry, the rule of the criminal law that a conviction cannot be had upon a confession alone not corroborated by in-

dependent evidence of the *corpus delicti*. The short and conclusive answer to this contention is that Congress has expressly declared that an alien who makes such an admission shall be deported. And, of course, "The power of Congress to prescribe the terms and conditions upon which aliens may enter or remain in the United States is no longer open to serious question." *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 425. Petitioner's argument goes to the wisdom and policy of the statute and should more properly be addressed to the Congress.

So far as this contention is concerned, the only issue in the deportation proceeding was whether petitioner had in fact admitted that he had committed a crime involving moral turpitude prior to his entry in 1939.[3] We do not understand that petitioner contends there was no sufficient evidence of such an admission. The fact is that petitioner did more than merely make the admission to inspector Busselle, as was shown at the hearing. At the hearing itself, when he was represented by counsel, he denied having been arrested for the New York crime but not that he had committed it. Confronted with his signed statements, he chose to stand mute. There was no impropriety in considering these statements as evidence, *Quon Quon Poy* v. *Johnson*, 273 U. S. 352, 357, and peti-

[3] Petitioner's challenge is limited solely to the admission of the crime and is not directed to the admission of his entry in 1939.

tioner's silence with respect to them was an admission, *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103; cf. *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, this time made at the very hearing held to determine the facts relating to his deportability.

3. The *Volpe* decision of this Court, *supra,* forecloses petitioner's contention (Pet. 16-20) that the provision of the statute for deportation upon admission of the commission of a crime prior to entry applies only where the crime was committed outside the United States. In the *Volpe* case, decided in 1933, the Court resolved an existing conflict in the lower courts as to the applicability of this provision to crimes committed in the United States and held that conviction of a resident alien of a crime committed in this country prior to a new entry renders him deportable. Petitioner argues, however, that there is a distinction in this regard between an admission of the commission of a crime and a conviction, but we perceive no basis for such a distinction. The statutory language is:

> * * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; * * * shall * * * be * * * deported.

The phrase "prior to entry" qualifies both the preceding clauses and shows that Congress was concerned with the fact of the crime and not with

the manner in which its commission is established. Congress obviously intended that a man guilty of a crime involving moral turpitude prior to entry should be deported. It follows *a fortiori* from the *Volpe* decision that admission of the commission of a crime within the United States prior to a second or subsequent entry, equally with conviction of such a crime, renders an alien deportable.

Wong Yow v. *Weedin*, 33 F. 2d 377 (C.A. 9), and *Ex parte Keizo Shibata*, 35 F. 2d 636 (C.A. 9), both decided in 1929, upon which petitioner relies in support of this contention, do not avail him. As petitioner's quotations from those decisions (Pet. 17-18) show, the Ninth Circuit thought that the provision for deportation of aliens on account of crimes committed prior to entry applied only where the crimes were committed outside the United States. While those cases involved admissions of crime, other courts of appeals before the *Volpe* decision applied the same rule in cases of convictions of crimes in the United States. *Browne* v. *Zurbrick*, 45 F. 2d 931, 934 (C.A. 6); *United States ex rel. Giacone* v. *Corsi*, 64 F. 2d 18 (C.A. 2). But still other courts had followed the rule later adopted by this Court in the *Volpe* case (*United States ex rel. Medich* v. *Burmaster*, 24 F. 2d 57 (C.A. 8); *Gomes* v. *Tillinghast*, 37 F. 2d 935 (D. Mass.)), as had the Ninth Circuit in two decisions prior to its *Wong Yow* decision, *supra* (*Weedin* v. *Tayokichi Yamada*, 4 F. 2d 455;

Bendel v. *Nagle,* 17 F. 2d 719). These divergent decisions in the lower courts made no distinction between an admission and a conviction of a crime. The controversy concerned the place where it was committed. And it was this conflict which this Court settled in the *Volpe* case (see 289 U. S. at 425, where the Court referred to the Seventh Circuit's opinion under review, 62 F. 2d 808, for the citations of the earlier conflicting decisions).

4. Similarly, the *Volpe* case is conclusive of petitioner's final contention that his "re-entry" following an absence of only several hours was not an "entry" within the meaning of the statute (Pet. 20-22). Petitioner expressly disavows any intention to attempt to distinguish that case or *Lapina* v. *Williams,* 232 U. S. 78; *Lewis* v. *Frick,* 233 U. S. 291; and *United States ex rel. Claussen* v. *Day,* 279 U. S. 398 (Pet. 20-21), nor apparently does he rely upon *Delgadillo* v. *Carmichael,* 332 U. S. 388, which is, in any event, readily distinguishable from the others.[4] His argument, rather, is that—

> the rule that "entry" in Section 19(a) means "re-entry" of an alien who is lawfully here for permanent residence and who never relinquished that residence is an unreasonable and unwarranted construction of that section and not required nor sanctioned by it. [Pet. 21.]

---

[4] It held that an alien seaman whose ship was sunk and wrecked while on an intercoastal voyage during the war and who was rescued and taken to Cuba and then returned to the United States, had not thus made a re-entry since his landing at a foreign port was not voluntary but accidental.

But the cases on this point cited above hold to the contrary. There is no doubt that petitioner voluntarily left the United States on Thanksgiving Day, 1939, knowing that he was entering Mexico, a foreign country. Like the alien in the *Volpe* case, his residence in the United States was of long duration. The difference between petitioner's absence for several hours and Volpe's absence for a "few days" (62 F. 2d 808, 809) is not such as to justify different readings of the same statute. And this Court said in the *Volpe* case, 289 U. S. at 425:

> That the second coming of an alien from a foreign country into the United States is an entry within the usual acceptation of that word is clear enough from *Lewis* v. *Frick,* 233 U. S. 291; *Claussen* v. *Day,* 279 U. S. 398.

CONCLUSION

We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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